No. 11,447

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FONG HOW TAN, *Appellant,* VS. ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California, *Appellee.*

BRIEF FOR APPELLANT.

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STATEMENT OF CASE.

This is an appeal from an order of the District Court for the Northern District of California denying a petition for a writ of habeas corpus. (Tr. p. 8.)

The appellant is a native of China. He arrived in the United States in August, 1910, and he was duly admitted for permanent residence by the United States immigration authorities for the Port of San Francisco. He has resided continuously in the United States from the date of entry until the present date. On June 11, 1925, after he had resided in the United

States for more than 5 years, an indictment was returned against the appellant in the Superior Court of Fresno County, California, charging him with two (2) counts of murder. This indictment is fully set forth in the Immigration records on file before this Court. On July 21, 1925, the appellant was found guilty of 2 counts of murder and sentenced to serve a life term in San Quentin.

ARGUMENT.

The immigration authorities claim the right to deport the appellant under a warrant issued by the Attorney General charging in substance that the appellant has been sentenced to imprisonment more than once for a term of one year or more for the commission, subsequent to entry, of a crime involving moral turpitude.

The essential point to be determined in this case is the construction to be placed upon Section 155(a) Title 8 U.S.C.A., which reads in part as follows:

> "* * * except as hereinafter provided, any alien, who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or *who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude committed at any time after entry * * * shall, upon*

the warrant of the Attorney General, be taken into custody and deported * * *." (Italics supplied.)

* * * * * * *

"The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter. * * *"

Congress, therefore, has differentiated between aliens, who have been once sentenced and those who have been sentenced "more than once". The former class may be deported only if the crime was committed within five years after entry; the latter class without regard to the length of time after entry that their crimes were committed.

It will be conceded that the case of the appellant falls within the latter class and the sole question, therefore, is

> "Has the appellant been sentenced more than once to a term of imprisonment of one year or more."

The point raised by this appeal is not new, nor is it unique. It was considered in the case of *United*

States ex rel. Mignazzi v. Day, 51 Fed. (2d) 1019, where Judge Learned Hand commenting upon a situation similar to the one presented here, uses the following language:

> "Congress might have made the test merely the conviction for any shameful crime, or conviction for such a crime if a sentence of one year might be imposed. Either would have embodied an intelligible policy, but neither was chosen. On the contrary, a judge must actually sentence the alien to imprisonment for a year, and thus indicate that the particular circumstances of the offense warrant so much reprobation. If the alien has lived here for five years, the judge must do this twice. We agree that each count in an indictment, like each indictment itself, is a separate charge, and that nothing is lost or gained by the form of pleading adopted. Moreover, there must be a judgment upon each charge, however pleaded, in order to dispose of it; the only judgment in a criminal case is the sentence; procedurally a general sentence to 'run concurrently' is a separate sentence on each count. We are as clear, however, that although a judge does in this sense impose more than one sentence in such a situation, he sentences the convict to one term only; that though he imposes several sentences, he exacts but one punishment; in short that he does not 'more than once' sentence 'to a term of imprisonment.' *It is the duplication of penalties which counts; and the test of these is practical, not procedural. Any other construction leads to absurd results."* (Italics supplied.)

At the risk of repetition we repeat the words of Justice Hand,

> "It is the duplication of penalties which counts; and the test of these is practical, not procedural. Any other construction leads to absurd results."

We also wish to point out the decision of Judge Sibley in *Opolich v. Fluckey, Director of Immigration,* 47 Fed. (2d) 950, where he said:

> "Whether he can be deported depends upon whether or not he has been sentenced more than once to a term of imprisonment because of a crime involving turpitude. Technically he committed four crimes, notwithstanding they were connected together and apparently in the same scheme of counterfeiting. Possibly he may be said to have been sentenced for all four, but it seems to me a great strain of language to say that he has been sentenced more than once. *And in my opinion Congress had in mind what are commonly called 'repeaters,' that is to say, persons who commit a crime and are sentenced, and then commit another and are sentenced again. These last I think were the persons who were intended to be deported, notwithstanding they may have been residents of this country for more than five years."* (Italics supplied.)

The appellant herein was not charged on two separate occasions with two separate and distinct offenses, but was charged in one indictment of two counts. All offenses committed by him obviously arose out of one transaction during which he killed two men. It was one transaction and not two isolated

instances. The record will show that the alleged offenses were committed as one activity at the same time and the same place. It is analogous to the situation wherein a defendant may have, for instance, by the use of explosives or by means of driving an automobile killed two or more persons during the consummation of one criminal act. It is the law of the United States that a man who commits one offense, after having been in the country for five years, cannot be deported because of the commission of that offense, and it is obvious that it was the intent of Congress to deport only those persons who repeated a criminal offense and not those persons who by a technical application of the law can have their single crime so divided as to constitute separate offenses. An analogous example is the possession of counterfeit money where a man who has in his possession a number of counterfeit bills is actually committing the offense of having possession of counterfeit money, but under the technical rules of pleading he can be charged for a separate offense for each bill in his possession, but it is obvious in such a case that practically only one offense has been committed.

CONCLUSION.

We submit that a review of the record in this case shows that it is not the type of case contemplated by Congress when it enacted Section 155(A) Title 8 U.S.C.A. and that this appellant has not in fact been sentenced more than once to a term of imprisonment.

This case is exactly of the type considered by the Courts in the cases cited herein.

We respectfully ask that the order of the Court below be reversed with directions to issue the writ.

Dated, San Francisco,
February 28, 1947.

Respectfully submitted,
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Attorneys for Appellant.